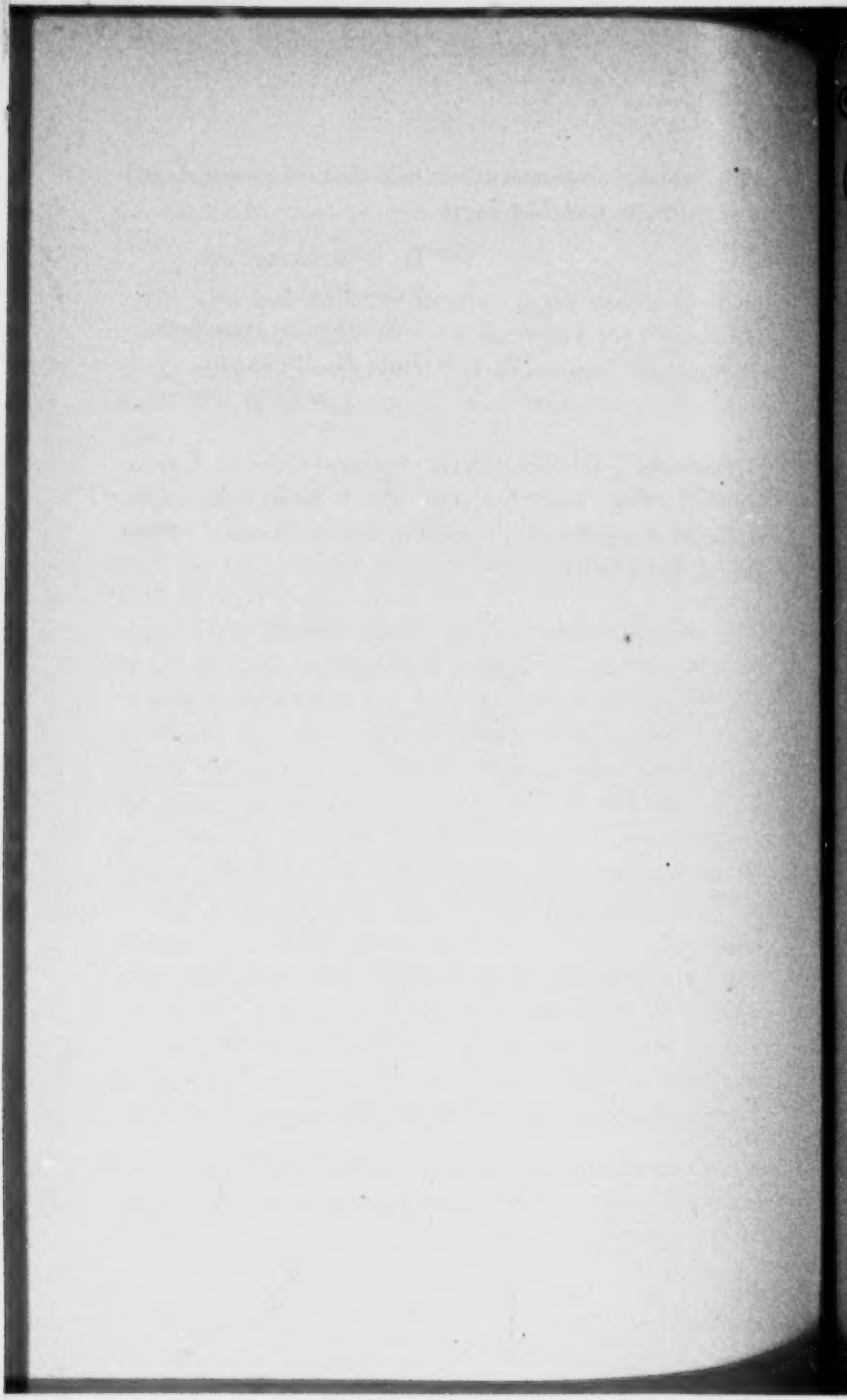

No. 226.

Brf. of Burnett v Beall for Appts.

FILED
OCT 19 1901
JAMES H. McKENNEY,
Clerk.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. ~~332~~ 226.

PABLO MARSE, JOSÈ L. LOPEZ, DIONICIO GONZALES, AND JESUS MARIA TAFOYA, APPELLANTS,

VS.

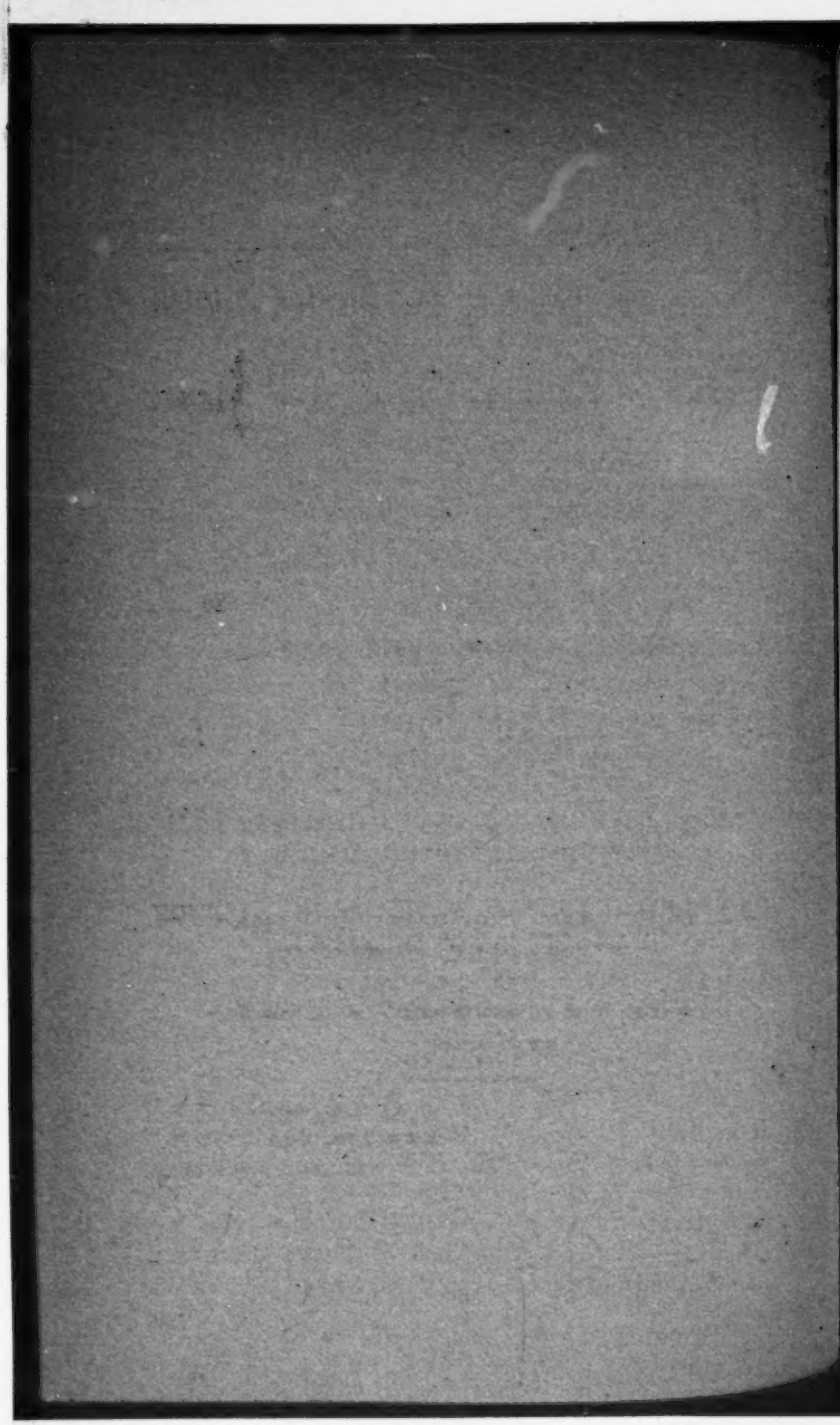
BINGER HERMANN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, AND ETHAN ALLEN HITCHCOCK, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR THE APPELLANTS.

H. C. BURNETT,
FRED BEALL,
Appellants' Solicitors.

MILANS, LAW PRINTER, 610 E STREET, N. W., WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 533.

PABLO MAESE, JOSÈ L. LOPEZ, DIONICIO GONZALES, AND JESUS MARIA TAFOYA, APPELLANTS,

VS.

BINGER HERMANN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, AND ETHAN ALLEN HITCHCOCK, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR THE APPELLANTS.

I.

Statement.

Pablo Maese, José L, Lopez, Dionicio Gonzales and Jesus Maria Tafoya, filed their bill in equity in the Supreme Court of the District of Columbia, in their own right as heirs of the original grantees of the Las Vegas land grant and on behalf of all the other heirs and assigns of said grantees, against Binger Hermann, Commissioner of the General Land Office, and Ethan

Allen Hitchcock, Secretary of the Interior of the United States, in their respective official capacities, to obtain an injunction to restrain them from issuing a patent for 496,446.96 acres of land in San Miguel County, New Mexico, comprising what is known as the Las Vegas private land grant, to a so-called town of Las Vegas, and for a decree directing said officials to issue a patent for said lands, to the grantees named in said grant, their heirs, legal representatives and assigns. The original grantees, that is, those names in the grant were Juan de Dios Maese, Manuel Duran, Miguel Archuleta, and José Antonio Casaos, and there were 25 whose names were not stated in the petition for the grant, or the grant itself.

The bill set out the material facts connected with the making of the grant in March, 1835, by the proper authorities of Mexico, the investigation made by the Surveyor–General of New Mexico in 1858, pursuant to the Act of Congress of July 22, 1854, to ascertain the origin, nature, character, and extent of all private claims of grants to land under the laws, usages and customs of Spain and Mexico, and his findings in reference to the Las Vegas Grant as shown by his report, made upon a petition presented to him by Francisco Lopez, Henry Connelly, and Hilario Gonzales, in behalf of themselves and others, claimant's for and legal owners of said land under said grant, wherein said Surveyor–General had reported that he found the grant made to Juan de Dios Maese et al., (being that under which the appellants now claim) was made in strict conformity to the laws and usages of Mexico at the time, and that the lands were thereby lawfully separated from the public domain, and entirely beyond the disposal of the General Government, and that said grant was valid and good. The bill alleges that the report of the Surveyor–General was duly confirmed by Congress, June 21,

1860, that the grant had been surveyed and the survey approved in 1860, and yet notwithstanding said grant was regularly made by the proper authorities of Mexico as above stated, to certain private individuals, and had been confirmed by Congress, and the survey thereof approved, the Commissioner of the General Land Office, acting under the orders and directions of the Secretary of the Interior, was about to issue a patent to all of said lands to a so-called town of Las Vegas.

The bill avers that at the time of the making of the Las Vegas grant there was no place or collection of people having any legal existence under the laws, customs, or usages of the Republic of Mexico, or the Territory of New Mexico, known or designated as the town of La Vegas, nor was there any town by the name of Las Vegas on said grant, or elsewhere, at that time, which under the laws in force at that time in the Territory of New Mexico had any legal or corporate existence, or which under or by any custom or usage in force in New Mexico could take or acquire title, either equitable or legal, to any lands whatsoever, and that a patent issued naming as patentee therein the town of Las Vegas would be void and an irreparable injury to complainants. (Rec., 1–7.)

Complainants pray that the defendants be enjoined from issuing patent to the so-called town of Las Vegas as patentee, and that defendants be ordered to issue patent to said tract of land to the original grantees, their heirs and assigns, and that if the patent had already issued, that the Court declare said patent null and void, and that the defendants be ordered to issue patent as before stated; that is, to the heirs, legal representatives, and assigns of the said Juan de Dios Maese, Manuel Duran, Miguel Archuleta and Jose Antonio Casaos, and those who were associated with them as the original grantees.

The defendants demurred generally to the bill, assigning three causes:

First. Said bill of complaint is bad in substance and for want of equity, and does not state facts sufficient to entitle the plaintiffs to the relief prayed for, or to any relief.

Second. The court has no jurisdiction over the subject-matter of the suit.

Third. There is a defect of parties defendant, (Rec. 8).

The demurrer was sustained, and the complainants declining to amend their bill, it was by the Court dismissed, from which decree of the court complainants appealed to the Court of Appeals of the District of Columbia, which affirmed the decision of the Supreme Court of the District.

The opinion of Justice Hagner, of the Supreme Court of the District, is found on pages 10–18 of the Record, and the opinion by the Court of Appeals is found on pages 20–34 of the Record.

The appellants now bring the case to this Court by appeal and assign four errors, as follows, to wit:

1, The Court of Appeals of the District of Columbia erred in affirming the decision of the Supreme Court of said District, wherein it sustained the demurrer to the bill of complaint and dismissed said bill.

2. The Court erred in deciding and holding that the Las Vegas land grant was confirmed by Congress to the town of Las Vegas.

3. The Court erred in deciding and holding that said land grant is a community grant.

4. The Court erred in deciding and holding that the Las Vegas grant as made by the Mexican Government

was not intended to be assigned to Maese and his associates in absolute property, to them and their heirs, but that it was intended to be held by them in trust for the benefit of the inhabitants that might settle thereon.

II.

History of the Grant, Legislative and Departmental Action Thereon.

The subject-matter of this suit is a Mexican Land Grant made by the proper authorities of Mexico, March 23, 1835, and was confirmed by Congress June 21, 1860. (12 Stats., 71).

As a part of the fruits of the war with Mexico, the province of New Mexico was ceded to the United States by the treaty of Guadalaupe Hidalgo of 1848. The said treaty grants to the residents of the ceded Territory a full and complete enjoyment of their property as ample and as full as enjoyed by the citizens of the United States.

For the purpose of carrying out the obligations of said treaty in the Territory of New Mexico, Congress, July 22, 1854, passed the following Act:

> Sec. 8. *And be it further enacted*, That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the Treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the

validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

Sec. 9. *And be it further enacted*, That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act." (10th Stats., p. 309.)

Under the provisions of the 9th section the Secretary of the Interior on the 21st of August, 1854, issued instructions to the Surveyor-General of New Mexico for his guidance in his investigation of Spanish and Mexican grants; these being the only kind of grants that he was authorized to investigate and report upon.

The Secretary in his letter said:

"The duty which this enactment involves upon the Surveyor-General is highly important and responsible. He has it in charge to prepare a faithful report of all the land titles in New Mexico which had their origin before the United States

succeeded to the sovereignty of the country, and the law contemplates such a report as will enable Congress to make a just and proper discrimination between such as are *bona fide* and should be confirmed and such as are fraudulent or otherwise destitute of merit and should be rejected. * * *

The security to private property for which the Treaty of Guadaloupe Hidalgo stipulates is in accordance with the practice of public law as universally acknowledged by civilized nations." * * *

He then cites him to the various decisions of the Supreme Court with reference to land grants in Florida and Louisiana, and also to other legal authorities. He further instructs the Surveyor-General as follows:

"Your docket should be a condensed exhibit of every case of your decision. The claims, both as to grade and dignity, may be qualified by numerals or alphabetically, accompanied by explanatory notes, in such a manner that will show every case confirmed and every one rejected by you.

In the case of any town lots or pasture lots, held under a grant from a corporation or town to which the lands may be granted for the establishment of a town by the Spanish or Mexican Governments, or the lawful authorities thereof, or in the case of any city, town, or village lots, which city, town, or village existed at the time possession was taken of New Mexico by the authorities of the United States, the claim to the same may be presented by the corporate authorities; or where the land on which the said city, town, or village was originally granted to an individual, the claim may presented in the name of said individual; and the fact being proved to you of the existence of said city, town, or village at a period when the United States took possession, may be considered by you as *prima facie* evidence of the grant to said corporation, or to the individual under whom the lotholders claim; and where any city, town, or vil-

lage shall be in existence at the passage of the act of the 22d of July, 1854, the claim for the land embraced within the limits of the same may be proved up before you by the corporate authorities of the said city, town, or village. Such is the practice sanctioned by the act of 3d of March, 1851, for the adjudication of Spanish and Mexican claims in California, and I think its application and adoption proper in regard to claims in New Mexico."

September 11, 1855, Francisco Lopez, Henry Connelly, and Hilario Gonzales, on behalf of themselves and all the other legal owners of the tract of land which was granted to Juan de Dios Maese *et al.* by the authorities of the Mexican Government in 1835, filed their petition before the said Surveyor-General, praying for their claim and title to said tract of land to be examined as required by law, and that said grant be confirmed to them, viz.:

UNITED STATES OF AMERICA, }
Territory of New Mexico. }

To the Hon. William Pelham, Surveyor-General of the Territory of New Mexico:

Francisco Lopez and Henry Connelly and Hilario Gonzales, on behalf of themselves and a large number of citizen of the United States, residents of the town of Las Vegas and its vicinity, in the county of San Miguel, Territory of New Mexico, represent to your honor that they, and the citizens they represent, are the claimants and legal owners of a certain tract of land lying and being situate in the County of San Miguel, in the Territory of New Mexico, which said land was granted by the provincial deputation of said Territory in the year A. D. 1835, to Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, in their own behalf and that of twenty-five other in-

habitants of said county, which said grant is now filed with this petition, (with leave to refer thereto as often as may be necessary,) and the boundaries of said grant are as follows to-wit: Bounded on the North by the Sapello River, on the South by the boundary grant of Don Antonio Ortiz, on the East by the Aguage de la Llegua, and on the West by the grant of San Miguel del Bado; and the said claimants claim under and by virtue of settlements made under said original grant, and in conformity with the terms of said grant. Your petitioners refer to the laws, usages, and customs of Mexico in force at the time of the making of said grant, to the Spanish laws and regulations which were declared and recognized by the government of Mexico to be inforce and effect. For which power and authority see Collection of the Decrees and Orders of the Cortes of Spain, published by Mariana Galvin, in 1829, page 56, and from page 91 to 101; see also Decrees of Mexico of June 4 and September 18, 1823, pages 123 and 180, 2 vol. Collection of Decrees; see also Ordenanzas de Tierras y Aguas, page 8; Peters' Reports, 436; 1 Howard, 24; 15th Peters, 130; 6th Peters, 621; Holcomb's U. S. Digest, pages 358 to 363.

The said claimants cannot show the quantity of land embraced in said grant, except as the same are set forth in the boundaries of said grant, nor can they furnish a plat of survey of said grant, as no survey of said land has ever been executed.

Your petitioners, the claimants, are also informed and believe that Thomas Cabeza de Baca, for himself and others, are claimants also for the lands embraced in said grant and now claimed by your petitioners. Your petitioners pray that their claim and title to said lands be examined as required by law, and that said grant be confirmed to them; and, as in duty bound will ever pray, &c.

SMITH, HOUGHTON & ASHURST,
For Petitioner.

(H. Ex. Doc. 14, 36th Cong., p. 16).

The original grant referred to is in Spanish, and a true translation in English was prepared by the Surveyor-General. The translation is found in H. Ex. Doc. 14, 36th Congress, pages 27 to 30, both inclusive, as follows;

GRANT-TRANSLATION.

Seal Third. (Seal.) Two Rials.

For the years one thousand eight hundred and twenty-six and eight hundred and twenty-seven:

Most Respectful Corporation: The citizens Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, for themselves and in the name of twenty-five men, appear before your honorable body in the best and most approved manner, and according to law, and state that having registered a vacant and uncultivated piece of land commonly known by the name of Las Vegas, on the Gallinas River, about five leagues distant from this settlement, which land we solicit for the purpose of planting a moderate crop, to have also the necessary land for pasture and watering places, and having the following boundaries: On the north the Sapello River, on the south the boundary of the grant made to Don Antonio Ortiz, on the east the Aguage de la Zegua, and on the west the boundary of the grant to San Miguel del Bado, which grant we pray for without injury to any third party, binding ourselves to receive possession in the name of the federation, and to comply with the reasonable and equitable conditions which your excellency, by virtue of the authority conferred upon you, may be pleased to establish for the grant of the land, being pleased to lay this, our petition, before the most excellent territorial deputation, having first obtained the customary

report which by law is intrusted to your excellency, in order that that most excellent body may order the aforesaid grant to be made to us, in which the advancement of agriculture and the well being of several families without occupation are interested. Therefore, we request and pray your excellency, that considering us as having presented ourselves, to yield to our petition, which we swear not to be done in malice; and in whatever may be necessary, etc.

JUAN DE DIOS MAESE. (Rubric.)
MANUEL DURAN. (Rubric.)
MIGUEL ARCHULETA. (Rubric.)
JOSÈ ANTONIO CASAOS. (Rubric.)

SAN MIGUEL DEL BADO, *March 20, 1835.*

San Miguel Del Bado in the Town House on the 20th day of March, 1835.

The foregoing petition, signed by the subscribers thereto, is received. This corporation, desirous of encouraging the advancement of agriculture, and the location of so many families without occupation, and being true that the land solicited as above is public land, and without injury to any third party nor of (torn) X X X let this petition proceed to the most excellent territorial deputation, in order that its excellency, if it sees proper, may provide them with the land prayed for, the entailment of which is earnestly aspired to:

JOSÈ ULIBARRI, *President.* (Rubric.)
FRANCISCO SENA, *First Justice.* (Rubric.)
LEONIOS LUCERO, *Fourth Justice.* (Rubric.)
GERONINO GONZALES, *Second Justice.* (Rubric.)
THOMAS ARAGON, *Attorney.* (Rubric.)
JOSE CANDELARIA FLORES, *Third Justice.* (Rubric.)

Before me, JOSÈ ANTONIO CASAOS.
Secretary of Corporatoon. (Rubric.)

Book 1st, page 6.

OFFICE OF THE MOST EXCELLENT DEPUTATION OF NEW MEXICO,

SANTA FE, *March 23, 1835.*

In consultation of to-day, its excelency has resolved as follows: The land contained within the boundaries expressed in this petition is granted not only to the petitioners and the residents of El Bado, but also generally to all who may be destitute of lands to cultivate, provided, "that the grant to these lands is made on condition that the pasture and watering places are free to all. In view of all which, the political chief will receive the petition which may be made and shall cause them to be provided for, agreeably to what has been ordered."

In compliance with instructions, let these original proceedings be forwarded to the political chief, who will be pleased to execute what is therein ordered by this deputation, by whose order the foregoing is done.

R. ÁBREU, *Secretary.* (Rubric.)

In reference to a petition by the President's (torn) X X X Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, for themselves and in the name of twenty-five other individuals dated the 20th instant, in which they solicited land in Las Vegas, its excellency, the provincial deputation, has resolved the following in reference to the matter:

(Book 1st, page 6.)

OFFICE OF THE SECRETARY OF THE MOST EXCELLENT DEPUTATION OF NEW MEXICO;

SANTA FE, *March 23, 1835.*

In the consultation to-day its excellency has resolved as follows: The land contained within the boundaries expressed in this petition is granted not only to the petitioners and the residents of El

Bado, but also generally to all who may be destitute of lands to cultivate, provided, "That the grant to these lands is made on condition that the pasture and watering places are free to all. In view of all which the political chief will receive the petition made, and shall cause them to be provided for, agreeably to what has been ordered."

In compliance with instructions, let these original proceedings be forwarded to the political chief, who will be pleased to execute what is therein ordered by this deputation, by whose order the foregoing is done.

R. RBREU, *Secretary.* (Rubric.)

And I communicate it to you for the entire compliance therewith, taking into consideration that the grants are to be made according to the means of each one of the petitioners, in order that they may not leave any land which may be given to them without cultivation. It is also convenient to suggest that you should select a site for a town to be built by the inhabitants, together with such other steps as you may deem proper for the security of the inhabitants, who, on account of settling on the lands indicated, will be included in your jurisdiction; you will therefore adopt such measures as will be most conformable to the laws.

You will retain the petition relative to the matter, and return (torn) as this should be (torn) of the proceedings had by you; all of which you will inform this government so soon as it is in condition to do so.

God and Liberty.

F. SARRACINO. (Rubric.)

SANTA FE, *March 24, 1835.*

On this date the justice of El Bado is notified to proceed according to the directions of the most excellent deputation of this goverment.

SARRACINO. (Rubric.)

(On first page dated March 24, 1835.)

SANTA FE, *March 24, 1835.*

To the Constitutional Justice of Fe Bado:

At this time there is no paper with the third seal in this office.

SARRACINO.

At Nuestra Soñora de los Dolores de Las Vegas, on the sixth day of the month of April, in the year one thousand eight hundred and thirty-five, jurisdiction of San Miguel del Bado, I, the citizen José de Jesus Ulibarri y Duran, constitutional justice, the only one in this jurisdiction, proceeded to this town for the purpose of distributing the lands to twenty-five individuals, mentioned in the petition, dated March 28, 1835, and in general to those who are without lands, not only those within this jurisdiction, but also anyone who may present himself to me who has no occupation; and having examined the land, I took the measures from north to south, after which I made the distribution according to that portion of the colonization law which refers to grants of the public land, complying with the greatest care with the directions of the most excellent territorial deputation of New Mexico, contained in its decree of the 23d of March, 1835, and the decree of his excellency the political chief, citizen Francisco Sarracino, dated the 24th of the same month; each individual received a gratuitous piece of land according to his means, with the understanding that of the lands given to the persons contained in the accompanying list none should remain uncultivated. The whole matter was concluded with the best measures which myself and the parties interested considered the most convenient, in order that each party should be satisfied with his share, setting opposite to each one's name the number of varas he received. The aforementioned list also contains the number of individuals who resided

in the new settlement, and, after having made the distribution, I proceeded to make known to them the petition found at the commencement of this document, assigning them the same boundaries as set forth in the petition. I also informed them that the water and pasture were free to all, and that the joint labor should be done by themselves without any dispute, and that the wall surrounding the town marked out should be made by them all, which being done, that they notify the justice, in order that he may mark out to each one equally the portion he is entitled to. Also, that each one be well provided with arms, the care of which is intrusted to the lieutenant of police of that ward, who shall inspect the arms every eight days, and, should he observe any infraction, to inform this court, as the head of the ward thereof, so as to provide the necessary measures. They were also informed that no one should sell his lands until he acquired the title prescribed by law to all colonists, and, in order that it may so appear at the present time and in the future, placed the originals in the archives under my charge, signing the same with three attending witnesses, in the absence of (torn), there being none in the terms (torn) law, to which I certify.

JOSE JESUS ULIBARRI. (Rubric.)

Attending,

JOSÉ MIGUEL SANCHEZ. (Rubric.)

Attending,

ANTONIO NIETO. (Rubric.)

Attending,

MANUEL DURAN. (Rubric.)

DECREE: The originals annexed to these proceedings, containing eight written pages, are deposited in the archives under my charge. I have so provided, ordered, and signed on said day,

month, and year, and I sign with those in my attendance, to which I certify.

JOSÉ DE JESUS ULIBARRI. (Rubric.)

Attending:

MANUAL DURAN. (Rubric.)

Attending:

ANTONIO NIETA. (Rubric.)

List showing the number of individuals who occupy the new settlement entitled "Nuestra Senora de los Dolores de Las Vegas," and showing the number of yards of land each one has received, which is as follows, to wit:

Then follows the names of thirty-one persons.

The Baca claim referred to in the foregoing petition of Lopez, Connelly and Gonzales, having also been presented, the two were examined and investigated by the Surveyor-General. He took proof as to the "origin, nature, character, and extent" of both claims, copies of which proof accompanied his report made to Congress, December 18, 1858. Said report was transmitted to Congress through the General Land Office, and is as follows:

REPORT.

The Heirs of Luis Maria Baca and the Town of Las Vegas:

The first of the above-mentioned cases was filed in this office on the 19th of June, 1855, and the second on the 11th of September of the same year.

These cases were set for trial at different periods, but owing to the absence of counsel and witnesses were not brought to a final close until the 10th of December, 1858.

The claim of the heirs of Luis Maria Baca is based on the following facts, as set forth in the

original papers filed in the office of the claimants. (Reference to Baca grant omitted.)

The claim of Las Vegas is based on the following proceedings:

On the 20th day of March, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and Jose Antonio Casaos, for themselves and in the name of twenty-five others, petitioned the corporation of El Bado for a tract of land for cultivation and pasture situated in the County of El Bado and bounded as follows: On the north by the Sapello River, on the south by the boundary of the grant of Don Antonio Ortiz, on the east by Aguage de la Llegua, and on the west by the boundary of the town of El Bado.

On the same day the corporation of El Bado transmitted the petition to the territorial deputation with the boundaries asked for, with the further provision that persons who owned no lands were to be allowed the same privilege of settling upon the grant as those who petitioned for it.

On the 24th of the same month and year Francisco Sarracino, the acting governor or political chief, directed the constitutional justice of El Bado to place the parties in possession, which was done on the 6th day of April of the same year.

The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but as far as the documentary evidence shows is made in strict conformity with the laws and usages of the country at the time.

Testimony is introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the latter grant, and that they went upon the land knowing the existance of a prior grant; but as these matters are not deemed to be pertinent to the case so far

as this office is concerned, it is not necessary to comment upon them.

It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

WM. PELHAM, *Surveyor-General.*

SURVEYOR-GENERAL'S OFFICE, SANTA FE,
NEW MEXICO, *December 18, 1858.*

(H. Ex. Doc. 14, pp. 42–45.)

In 1860 some 32 private land claims, which had been investigated by the said Surveyor-General of New Mexico, were transmitted to Congress for its action. All of the papers pertaining to said grants were transmitted to Congress with his report thereon. The claims were designated by numerals; that is, the claims were numbered 1, 3, 4, 6, &c., to 38, inclusive. Congress passed upon all of these claims in the following act:

CHAP. CLXVII. — *An Act to confirm certain Private Land Claims in the Territory of New Mexico.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January,

eighteen hundred and fifty-eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor-general as number sixteen, be, and they are hereby confirmed: *Provided*, That the claim number nine, in the name of John Scolley and other, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants.

Sec, 2. And be it further enacted, that in surveying the claim of said John Scolley it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by him; and that in surveying the claim of said Cornelia Vigil and Ceran St Vrain, the location shall be made as follows, namely: The survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagnes, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized and requested by the terms of this section.

Sec. 3. And be it further enacted, That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstracts marked ex-

hibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six is not confirmed.

Sec. 4. And be it further enacted, That the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not effect the adverse rights of any other person or persons whomsoever.

Sec. 5. And be it further enacted, That it shall or may be lawful for the said Juan B. Vigil or any persons claiming title under him, to institute suit against the United States for the lands claimed and embraced in said claim number twenty-six, not confirmed under the provisions of the third section of this act; said suit to be instituted in the Supreme Court of the Territory of New Mexico, to be defended by the District Attorney of the United States for said Territory, under the direction of the Attorney-General of the United States, with the right of appeal to either party from the decision of the said supreme court to the Supreme Court of the United States, if such appeal be asked for within one year from the rendition of the judgment in said Supreme Court of the Territory of New Mexico, and not thereafter: Provided, That if the suit authorized by the section be not instituted within two years from the passage of this act, the said claimants shall be presumed to have abandoned all right or title to the lands embraced in said claim number twenty-six, and said lands shall thenceforth be held and deemed to be public lands belonging to the United States: And provided further, That in the determination of the suit authorized to be instituted by the terms of this sec-

tion, the courts shall be governed by the Treaty of Guadalupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity and the decisions of the Supreme Court of the United States, so far as they are applicable.

Sec. 6. And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number, And it shall be the duty of the Surveyor-General of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Approved, June 21, 1860. (12 Stats., p. 71–2.)

July 26, 1860, the Commissioner of the General Land Office addressed a letter to the Surveyor-General of New Mexico, which contains the following information and instructions:

"In advance of the publication of the laws passed by the last Congress, I herewith transmit you a slip of newspaper containing the Act to confirm certain private land claims in the Territory of New Mexico, approved June 21, 1860, showing what particular private land claims were finally confirmed in addition to those confirmed by Act of December 22, 1858. You are directed thoroughly to digest the provisions of the Act of Congress approved June 21, 1860, and to issue appropriate instructions as to the priorities of surveys.

> In this connection I have to draw your special attention to the sixth section of said Act of June 21, 1860. * * * This law gives the land to the Vegas town claim, and allows the Baca heirs to take an equal quantity of vacant land, not mineral, in New Mexico, to be located by them in square bodies not exceeding five in number. To give this law timely effect you will give priority, in surveying private land claims, to this claim, particularly as it is in the vicinity,—about four miles from the outside of the public surveys. You will proceed to have the exteriors of the Las Vegas town claim properly run and connected with the line of the public surveys. The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimants to locate a quantity equal to the area of the town tract elsewhere in New Mexico as vacant land, not mineral, in square bodies not exceeding five in number."

In obedience to said letter of instructions, the Surveyor-General caused the grant of land to be surveyed and platted, showing the area to contain 496,446 96 acres. The said survey and plat were approved by the Surveyor-General December 8, 1860. The said Surveyor-General as instructed, issued a certificate to the Baca heirs, showing that the Las Vegas grant contained 496,446.96 acres, which fact entitled said heirs to locate an equal number of acres, not mineral, elsewhere within the Territory of New Mexico. Shaw *vs.* Kellogg, 170 U. S., 315.

May 4, 1861, the Surveyor-General reported to the General Land Office said survey, plat, field-notes of the same, together with the accounts and cost of the survey where they were examined and the accounts and cost of the survey adjusted and settled. The papers were marked filed and the case marked closed, and

was thereafter reported by the Commissioner of the General Land Office in his annual reports, as confirmed for 496,446.96 acres.

Without referring specially to all the annual reports of the General Land Office, we copy from the following;

Report of 1869, p. 321.

> "Designation: 20. Name of Tract: Town of Las Vegas. Confirmed: Inhabitants of town. Area in acres: 496,446.96."

Report for 1880, pp. 654, 655.

> "Private land claims against the public domain in New Mexico on file in the office of the United States Surveyor-General for New Mexico, June 30, 1880.
>
> Tract known as the: Las Vegas, town of. Original grantees: Juan de Dios Maese et al. The grant made in: 1835. Made by: Mexico. Reported No.: 20. File No.: 12. The claim filed: September 11, 1885. Approved: December 18, 1858. Transmitted: August 15, 1859. Confirmed: June 21, 1860. The survey made: 1860. Acres: 496,446.96. County: San Miguel."

Report for 1885, pp. 138, 139.

> "List of confirmed and unconfirmed Indian pueblos and private land claims in the Territories of New Mexico and Arizona, and the State of Colorado.
>
> No. of claim: 20. Name of claimant: Inhabitants of the town: Name of claim: Las Vegas: Locality: New Mexico. Date of confirmation: June 21, 1860. Date of patent: ———. Area, 496,446.96. Reference to reports of Surveyor-General: House Ex. Doc. 14, 36th Congress, 1st Session."

The above extracts from the annual reports of the General Land Office show that for a full quarter of a century the grant was regularly reported as confirmed for 496,446.96 acres.

It will be observed that no provision is made by the Act of June 21, 1860, for the issuance of patents to those persons whose private land claims were confirmed thereby, and neither was there any general statute providing for or authorizing the issuance of patents for said confirmed grants at the passage of said Act.

Section 2447, Revised Statutes (taken from the Act of December 22, 1858, 10 Stat. at L., 599, chap. 10), applies only to cases of claims to land "which has heretofore been confirmed by law." (Shaw *v.* Kellogg, 170 U. S., 342.) That is, to claims confirmed by Congress prior to December 22, 1854, and therefore a patent could not issue under said section to those claims confirmed by the Act of June 21, 1860.

March 3, 1869, Congress passed an Act entitled An Act to confirm certain private land claims in the Territory of New Mexico, and provided for the issuance of patents in all private land claims "in said Territory which have heretofore been confirmed by Congress," viz:

> Sec. 2. And be it further enacted, That the Commissioner of the General Land Office shall, without unreasonable delay, cause the lands embraced in said several claims to be surveyed and platted, at the proper expense of the claimants thereof, and upon the filing of said surveys and plats in his office he shall issue patents for said land in said Territory which have heretofore been confirmed by acts of Congress and surveyed, and plats of such survey filed in his office as aforesaid, but for which no patents have heretofore been issued. (15 Stat. at L., 342.)

The heirs, representatives, and assigns of the original grantees of said grant, having made application to the Commissioner of the General Land Office for patent to the land embraced within the survey, approved by said office December 8, 1860, of what is known and designated as the "Las Vegas Grant," containing, as shown by the said approved survey and plat made by the Surveyor-General of New Mexico, 496,446.96 acres, the Hon. Acting Secretary of the Interior, on appeal December 17, 1898, denied the application of petitioners, and directed the Commissioner of the General Land Office to issue the patent for said tract of land to the town of Las Vegas. (27 L. D., p. 666.) Upon the notice of said order being given to appellants this suit was at once instituted.

III.

BRIEF AND ARGUMENT.

The principal question before this Court for determination is: Are the facts which were properly pleaded and set forth in the Bill of Complaint by the complainants, sufficient to give the Supreme Court of the District of Columbia jurisdiction of the subject-matter involved and the parties defendant? In that general question, involving the jurisdiction of the Court, there are included a number of minor questions which it will be necessary to present for consideration, but it is respectfully submitted that there are not as many questions to be considered, as were considered and passed upon by the Supreme Court of the District and the Court of Appeals.

The learned and accomplished attorney who argued this case in the courts below, and both of the tribunals, treated the case largely as though the lands embraced in the Las Vegas grant was public land, constituting a part

of the public domain of the United States. It never was any part of the public domain, but has always been private property, the complete legal title to which was in the original grantees under the Mexican grant. The appellants recognize fully the rule of law contended for by the defendants in the courts below, and as announced by the lower tribunals, that the Land Department alone has jurisdiction over the public lands, and the courts cannot take jurisdiction of them until after the title has completely passed out of the government. This Court has so often announced that doctrine that every member of the profession must be entirely familiar with it. In the administration of the public land laws the jurisdiction of the Land Department is exclusive until the patent issues, and as soon as the patent does issue the Land Department loses its jurisdiction, and that of the courts attach. It is said that there is no hiatus between the jurisdiction of the Land Department in reference to public land matters and the courts, that the one extends up to where the other commences. But that doctrine has no application to the case at bar, here the general jurisdiction of the Land Department never attached to the Las Vegas grant. The title as stated above was complete in the grantees before the cession of New Mexico to the United States. That fact was found by the Surveyor-General of New Mexico and reported to Congress and by the Congress confirmed. In his report he stated as follows:

> "The grant made to Juan de Dios Maese *et al.*, is not contested on the ground of any want of formality in the proceedings, but as far as the documentary evidence shows is made in strict conformity with the laws and usages of the country at the time."

Then referring to the two grants, that is the one to Baca and this one, he stated:

> "It is firmly believed that the land embraced in either of the two grants is legally separated from the public domain and entirely beyond the disposal of the general government, and in the absence of the one, the other would be a good and valid grant."

The fact is so vital in the determination of this case that we desire to emphasize it, that in its consideration it must be borne in mind all the time, that the Land Department never had anything to do with the *title* to this land. That matter was determined outside of the jurisdiction of the Land Department, namely, by Congress, and all that the Land Department ever had to do in reference to the grant up to the Act of Congress of the 3rd of March, 1869, was to instruct the Surveyor-General how he should proceed "to ascertain the origin, nature, character and extent of" the claim "under the laws, usages and customs of * * * * Mexico," and then after the confirmation, to cause the grant to be surveyed and platted.

The Act of Congress confirming this grant did not provide for the issuance of a patent, nor was there then any law in force which did require that a patent should be issued. Learned counsel for the appellees in his argument before the courts below stated that the appellees were preparing to issue a patent under the provisions of Section 2447 of the Revised Statutes, when the bill in this case was filed. Upon reference to that statute it will be seen that it had application only to claims to land which had prior to its enactment been confirmed by law, and in which no provision was made by the confirmatory Statute for the issue of a patent. That section was

enacted December 22, 1854, and as it applied only to land claims which had been confirmed before its passage, of course, it could not apply to the Las Vegas claim, as it was confirmed in 1860. That question was expressly decided by this court in Shaw *vs.* Kellogg, 170 U. S., 312, a case which arose under the act of Congress, that confirmed the Las Vegas grant. There was no express provision in the confirmatory act requiring a survey of any of the lands, claims to which were confirmed by the Act of June 21, 1860, but as stated in Stoneroad *vs.* Stoneroad, 158 U. S., 245, (the subject-matter of which was the Preston Beck claim, being claim No. 1 of the claims confirmed by the same act that confirmed the Las Vegas grant,) that

> "it is not to be presumed that Congress intended by confirming a grant which had never been surveyed, and had, therefore, never been distinctly separated from the public domain, to exempt it from the survey essential to its accurate segregation and delimitation. * * * * The general rule being to exact a survey, the grant here under consideration could only be exempted from this requirement by an expressed statement in the Act of Congress indicating the intention to depart from the rule in the particular instance. No such intention is anywhere expressed in the confirmatory act."

The survey and plat of the Las Vegas grant were made and approved in 1860; that fact is alleged in the bill of complaint, and admitted by the demurrer. It is expressly admitted by the appellees in the motion to advance this case (See page 2,) where it is said, "The application to advance is based on the following reasons: The grant was confirmed by act of Congress of June 21, 1860, and the grant surveyed and plat of survey filed in the General

Land Office, as required by law, and approved in December 1860, but no patent has yet been issued to any one."

The surveying and platting of the grant under the directions of the General Land Office and the filing of the survey and plats in that office were the final acts to be performed by the General Land Office in reference to the Las Vegas grant, as the law then stood. That being done the land to which the grantees already had a legal title was definitely separated from the public domain, and nothing then remained to be done in order to their complete and full enjoyment of the land granted. Nine years subsequent, however, in the wisdom of Congress it was conceived to be necessary or at least proper to the full enjoyment by the confirmees of private land grants in New Mexico that patents should be issued therefor, and accordingly on March 3, 1869, the act was passed providing "that the Commissioner of the General Land Office shall issue patents for said land in said Territory, which have heretofore been confirmed by acts of Congress, and surveyed, and plats of such survey filed in his office, as aforesaid, but for which no patents have heretofore been issued." (15 Stats., 342.) This duty to be performed under this act of Congress is the sole one remaining for the Land Department. The Surveyor-General had years before performed his duties under the act of Congress, and in full compliance with the directions of the Land Department, and made his report to Congress, as he was required to do. Congress had confirmed his report, and the General Land Office had the land surveyed and platted, and forty years ago approved that survey and plat, thus fully completing all their judicial functions in reference to the grant.

The fundamental question now before this court therefore is, What is the character of the act to be per-

formed by the Land Department in issuing the patent in this particular case? Is that act the exercise of a judicial function, or is it purely a ministerial one? The appellants do not contend that they would have a right to a patent if the grant had not been surveyed and platted and the survey and plat filed in the General Land Office, nor do they contend that they would be entitled to maintain their bill if the act of issuing a patent to any extent calls for the exercise of judicial powers; but it is now and has always been contended by the appellants that under the law the act of issuing a patent is a purely ministerial function, and one, therefore, that the courts have the power to control and direct upon a proper statement of facts.

Before taking that question up, however, it may be best for us to call attention to what we regard as a misconception upon the part of the court below as to the scope of the bill of complaint.

IV.

Erroneous Statement of Case by the Court of Appeals.

That the Court of Appeals did not have an entirely correct view of appellants' case. and the questions involved in this controversy, is quite manifest from the following statement:

> It is alleged in the bill, as we have seen, that the defendants, in the execution of the functions of their office in the Department of the Interior, are about to issue, or have determined to issue, or, it may be, have issued, a patent to the town of Las Vegas for the land included in the Las Vegas grant, and have refused to issue a patent to the

complainants and their associates for said land. And the question is, has a court of equity the power and jurisdiction to restrain this proposed or intended action of one of the executive departments of the Government, and to order the patent to be issued to the complainants? In other words, has a court of equity the power and jurisdiction to control and direct the executive Department of the Interior in the matter of adverse claims to a patent for land, where there has been a confirmation by act of Congress, without directing to whom a patent should issue. The confirmatory act of 1860 makes no provision for the issuing a patent, though it in terms confirms the claim for the land to the town of Las Vegas.

There are many things to be determined as preliminary to issuing a patent. The officer intrusted with the power must determine whether there has been a confirmation, and, as in this case, where there are conflicting claims, to which of the parties claiming the patent the confirmation by act of Congress applies. He must also determine all questions as to the accuracy and validity of the survey, and as to all the conditions upon which the patent can rightfully issue, That being the case, can a court of equity draw all these questions to itself for determination, and thereby exclude the executive department of the Government from the exercise of the function and duty expressly delegated to it by statute? We think not.

It is not stated in the bill that the appellants "have refused to issue a patent to the complainants and their associates for said land." The bill does not ask that a patent issue to complainants and their associates, but by reference to the prayer of the bill, found on page 7 of the record, it will be seen that the appellees ask that the Commissioner of the General Land Office " be by this Honorable Court ordered and directed to issue a patent to all of said land

to the heirs, legal representatives and assigns of said Juan de Dios Maese, Manuel Duran, Miguel Archuleta, Jose Antonio Cassaos, and those who were associated with them as the original grantees, and as representatives of said original grantees, and the prayer also is that the defendants be enjoined from " making or issuing a patent to said lands to any other than the heirs and assigns of the original grantees as mentioned and named and described in said grant made, as aforesaid, to Juan de Dios Maese, et al."

In other words the scope and purpose of the bill as shown by all the statements therein, and the prayer is that the patent should issue to the legal representatives of the original grantees in said grant. It was not contemplated by the appellants when they brought their suit that the Court would undertake to determine who were the legal representatives of the original grantees, because that was supposed by them to be beyond the power of the Court. The Court could not say whether the appellants were the real heirs or assigns, and it was no part of the jurisdiction of the court to be exercised in the case to determine for whose benefit a patent would inure. That is a question not now before the court and could not be. It must be determined hereafter. should any controversy on that subject arise.

Among the " many things to be determined as preliminary to issuing a patent," the Court said that the officer intrusted with that power " must also determine all questions as to the accuracy and validity of the survey, and as to all the conditions upon which the patent can rightfully issue," and then from those statements the Court proceeds to say, " that being the case, can a court of equity draw all these questions to itself for determination, and thereby exclude the executive department of the Government from

the exercise of the function and duty expressly delegated to it by statute?" Upon an examination of this statement by the Court of Appeals it will readily be discovered that the court enlarged and multiplied the questions to be determined by the Land Department before it should issue a patent in this case. As we have already shown, every question had been finally settled and disposed of, and every condition required by law complied with, except the single one of issuing the patent. None of the duties were required to be performed by the Land Department that were involved in the case of Litchfield *vs.* The Register & Receiver, 9th Wallace, 575, relied upon by by the Court of Appeals to sustain its position. That was a case in reference to public lands, and we are at a loss to understand how it is possible that the Court of Appeals could view that case as "quite analogos to the present." In our view there is absolutely no analogy between the two cases. That case, as stated by this Court, involved the question of title to land; a question which is not involved in this case at all. That case is stated as follows:

> "The appellant filed his bill in the Circuit Court for the District of Iowa, to restrain the defendants from entertaining and acting upon certain applications to prove pre-emptions to certain lands lying within the district for which they were respectively Register and Receiver.
>
> * * * * * *
>
> The lands in controversy are situated within the land district over which these officers have authority to receive proof of pre-emption and grant certificate of entry. There is within that district, of course, lands open to sale and pre-emption. There would be no use for the Land Office if there were not. The very first duty which the register is called on to perform when an application is made to him to enter a tract of land, is to ascertain

> whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any Act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the Acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and pre-emption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the Court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the Court in possession of their views, and defend their instructions from the Commissioner, and convert the contest before the Land Department into one before the Court."

As stated above, the questions before the Register and Receiver were those relating to the title of the land, and the primary question was whether they were public lands or not; that is, whether the title had passed out of the United States or not. Under the law as stated by this Court that was the first question for the Register and Receiver to pass upon, and, of course, it was not within the jurisdiction of the Court to withdraw from the Register and Receiver the determination of that question. Such is not the case here. When the survey of the Las Vegas grant had been made and its area determind in order that the Baca heirs might get an equivalent amount of land, the lines having been run by the Surveyor-General around the grant, thus definitely separating it from the public

domain, and when the survey and plats had been filed in the General Land Office, nothing could possibly remain to be done requiring the exercise of any judicial function upon the part of the General Land Office, and had it not been for the Act of March 3, 1869, that office would not have been called upon to perform any other duty whatsoever.

The Court of Appeals also cites the case of Brown *vs.* Hitchcock, 173 U. S., 473, and bases its opinion upon the principles declared in that case. The Court said in that case:

> "Under the Swamp Land Act the legal title passes only on delivery of the patent. So the statute in terms declares. The second section provides that the Secretary of the Interior, 'at the request of said governor (the governor of the state), cause a patent to be issued to the state therefor, and on that patent the fee simple to said lands shall vest in the said state.'
>
> In this case the record discloses no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the state, the legal title remained in the United States."
>
> Until the legal title to public land passes from the Government inquiry as to all equitable rights comes within the cognizance of the Land Department."

The title to the land in that case remained in the United States, and, of course, the land remained under the jurisdiction of the Land Department. The principle decided in that case is wholly different from the one involved in the case at bar. The Court said:

> "When the legal title to these lands shall have been invested in the State of Oregon, or in some individual claiming a right superior to that of the

State, then is the inquiry permissible in the courts and that inquiry will appropriately be had in the courts of Oregon, State or Federal.

"We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to assert his rights as against a proceeding in the Land Department, or when the Department refuses to act at all."

Citing, among others, the case of Noble *vs.* Union River Logging Railroad Company, 147 U. S., 165.

In that case it is said:

"This case involves not only the power of this court to enjoin the head of a Department, but the power of a Secretary of the Interior to annull the action of his predecessor, when such action operates to give effect to a grant of public lands to a railroad corporation."

With regard to the judicial power in cases of this kind it was held by this court as follows: in 1803 in the great case of Marbury *vs.* Madison, 1st Cranch, 137, that there was a distinction between acts involving the exercise of judgment or discretion, and those which are purely ministerial; that with respect to the former there exists and can exist no power to control the executive discretion, however erroneous its exercise may seem to have been, but with respect to ministerial duties, an act or refusual to act is or may become the subject of review by the courts. The principle of this case was applied in Kendall *vs.* United States, 12 Peters, 524, and the opinion of the circuit court sustained in a proceeding where it had commanded the Postmaster General to credit the relator with a certain sum awarded to him by the Solicitor of the Treasury under an act of Congress authorizing the latter to adjust the claim, this being regarded as purely a ministerial duty.

The Court then referring to the case of Decatur *vs.* Paulding, 14 Peters, 497, and a large number of other cases, proceeded to say:

> "In all these cases the distinction between judicial and ministerial acts is commented upon and enforced.
>
> We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of a head of a Department under any view that could be taken of the facts that were laid before him was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Justice Bradley in La. Board of Liquidation *vs.* McComb, 92 U. S., 531, 'but it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat corelative to each other.

V.

Is the Issuing of a Patent a Judicial or is it a Ministerial Act?

The answer to this question is conclusive of the case at bar. This Court has more than once answered the question, however, and has always, so far as we are able to discover, answered it in the same way, namely, that it is a ministerial act.

In Stoddard *vs.* Chambers, 2 How., 284, it is said on page 317: "The issuing of a patent is a ministerial act, which must be performed according to law."

And in United States *vs.* Stone, 2 Wallace, 525, it is said: "The patent is but the evidence of the grant, and the officer who issues it acts ministerially and not judicially."

The law requires in the issuing of a patent to the Las Vegas grant the performance of a simple, specific act, in no proper sense judicial. True the officer must in this case look to the grant, the report of the surveyor-general, and the act of Congress confirming the report, and see to whom he shall issue the patent, and for what land it shall be issued. He should do that just as the clerk of a court would issue the proper legal process upon an affirmed judgment. If a judgment in an action of ejectment for a number of pieces of land rendered in any United States Circuit Court, wherein the plaintiff had recovered certain tracts of land involved in that suit, but had failed to recover other certain tracts involved in the suit, and the case should be brought to this court, and the judgment of the lower court affirmed, before the clerk of the Circuit Court before whom the judgment had been originally entered could issue a writ of possession to the marshal, directing him to put the plaintiff in possession of the land to which he had been adjudged to be entitled, would have to read, and in sense construe the original judgment, and also the mandate of this Court sent down to the lower court, but in doing that, and in issuing the execution, no one would contend that he was acting otherwise than ministerially. So in the case at bar, the Commissioner of the General Land Office, having before him the entire record, only had to look at the grant, the *quasi* judicial judgment rendered by the Surveyor-General, and

then to the confirmatory act of Congress and issue the patent. He has no discretion in the matter, but must issue the patent "according to law" in order that the same may become "evidence of the grant." The principle contended for is clearly expressed in Roberts *vs.* U. S. *Ex rel.* Valentine, 176 U. S., 222, where this court says:

> "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the Court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the Court would on that account be powerless to give relief. Such a limitation of the powers of the Court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

But it may be asked how is it if the issuance of a patent in the Las Vegas case is purely a ministerial act, which may be controlled by the courts, that the issuance of a patent in a public land case cannot also be controlled by the courts? The answer is plain and simple. In a public land matter the jurisdiction of the Land Department is never exhausted until the patent issues. All the acts of the department before the patent issues, are in their nature interlocutory, and may, therefore, be recalled and set aside, as was said in the case of New Orleans *vs.* Paine, 147 U. S., 261, in ruling upon the finality of decisions of the Land Department. The Court says: "Until the matter is closed by final action the proceedings of an officer of the department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court upon a final hearing."

But it will not be and is not contended now in view of the record in this case, that the General Land Office has anything whatever to do with reference to this grant, but the issuing of a patent. There is, therefore, nothing to recall or revise. The case last above cited was a suit in equity against the Deputy Surveyor-General of the United States for the State of Louisiana, to enjoin him from surveying and locating a new back line or rear boundary to a French grant, and from dividing into sections lands alleged to belong to the plaintiff, north of and contiguous to such new back line. The case turned upon the power of the court to enjoin the action of an officer of the Land Department in relocating the boundaries of a land grant, and the Court said that obviously the decision of the Surveyor-General approving the act of his deputy, was not a finality. *So long as there was a superior officer whose approval was contemplated by law, or the regulations of the department, no approval by a subordinate officer would operate as a finality.* Then again:

> "It is quite evident from the correspondence that the first survey was never formally approved by the Secretary of the Interior or the Commissioner of the General Land Office, and that no title ever vested in the plaintiff to the lands included in his survey, though defendant having obeyed his instructions was, of course, entitled to his pay. If the department was not satisfied with this survey there was no rule of law standing in the way of its ordering another."

In the case at bar it is alleged that the survey had been made and approved. If that had not been done, as hereinbefore stated, the appellants would not be entitled to maintain their bill. In other words, if there was anything yet to be performed by the Land Department which required the exercise of a judicial discretion, then since the jurisdiction of the two tribunals cannot be exercised at one and the same time over the same thing, the courts would not have jurisdiction. It was also said in New Orleans *vs.* Paine, *supra*, after referring to the case of Noble *vs.* Union River L. R. Co.:

> "So, in this case, if it were made to appear that the former survey had been completed and approved in such manner, and that the lands included within the former survey had become vested in the plaintiff, it is possible that it might be entitled to an injunction against any act which would have the effect of disturbing or unsettling the title thereby acquired."

If a patent shall be issued in this case, not in conformity with law, and not in favor of the rightful parties, it would be calculated to disturb and unsettle the title of the legal representatives of the original grantees, and for that reason we insist that the court should interfere to control the issuance of the patent. And that is a com-

plete answer to the contention of the appellees that no injury can come to the appellants if a patent should be issued, though wrongfully, to the so-called town of Las Vegas. The court below and counsel were both in error in supposing that patent in this case should be issued under Sec. 2447 of the Revised Statutes. It is true that a patent, when issued, will not cut out any adverse rights neither did the confirmatory act cut out any adverse rights; upon the contrary it was expressly provided in that act that it should only operate as a relinquishment by the United States to the lands included in the grant. Still, no one it seems could contend that a patent issued to any other than the rightful persons could do otherwise than operate to the injury of those entitled to the land. It is upon this principle that all bills *quia timet* are based. A patent issued under the authority of the United States Government, to a party not entitled thereto, would, of course, cast a cloud and a doubt and a suspicion upon the title of the real owners, and there is no remedy at law which would be complete or adequate for their protection. A patent issued to the town of Las Vegas could not inure to the benefit of any one deriving title either mediate or immediate from the original grantees. The only remedy which the legal representatives of the original grantees could have, would be to go into court and file a bill to have that patent set aside and vacated. They could take no benefits under that patent at all. Congress, in its wisdom has declared in effect that it is necessary to issue a patent to the grantees, and it is, therefore, a substantial legal right to which they are entitled, and any deprivation of that right would necessarily work an injury which, we submit, is sufficient to give to the courts jurisdiction to prevent the patent being issued to an improper party.

VI.

Is the Town of Las Vegas a Necessary Party?

It is contended by the appellees that the town of Las Vegas is a necessary party defendant, and the failure to make it a party is fatal to the bill.

The case of Litchfield *vs.* The Register & Receiver, *supra*, is relied on to support the doctrine contended for. We do not deem it necessary to say anything more in reference to that case than we have already said, further than to repeat that that was a suit in reference to public lands, in which the bill admitted that there were persons not made parties to the bill who were asserting before the Register and Receiver their right to pre-empt certain lands, which lands were within the jurisdiction of the Register and Receiver, and that was a case in reference to title, while the case at bar has no reference whatever to the title to the lands embraced within the Las Vegas grant, but its sole object is to have the evidence of the title which already exists given to the parties in whom the title does exist. The appellants allege in their bill that there is not now and never was any town named Las Vegas having any legal or corporate existence, or any defined boundaries, or any place by that name capable in law of acquiring, having or holding title either legal or equitable to the lands included within the Las Vegas grant. It is replied that the court may disregard all these allegations in the bill and take judicial notice of the fact that there is such a town, because they say that the census reports, public maps, railroad guides, post office guides and histories all refer to the town of Las Vegas, and that they should prevail over the allegations in the bill. The appellants concede the fact that there is upon the maps a place designated as Las Vegas, and that

there is a post office there, and that the maps place it upon a railroad; and we may go further and concede that there is a large collection of people there, but that does not make a legal town or a municipality competent to take title to property. The fact remains, which is not only true of Las Vegas, but thousands of other places within the United States and its Territories, that there are no boundary lines to the place, nor has it ever been incorporated into a municipality, and does not have any local government; and that fact is not in conflict with the census reports, maps, railroad guides, post office guides or histories. If there was a place known as the town of Las Vegas which was included within defined boundary lines, then we concede that it would be competent to hold property notwithstanding it might not have been organized into a municipality. The condition of Las Vegas has always been similar to that of the towns in Oklahoma, which sprang up in that Territory between the date of its being opened to settlement and the acts of incorporation by the first legislature of the Territory after the organic act of May 2, 1890. The Territory was opened for settlement in April, 1889, but before it was opened for settlement there were already along the Santa Fe Railroad stations called towns; for instance, there was Guthrie, Oklahoma City, and many other places, yet none of them had any organic existence or any defined limits, and they so continued in that unorganized condition until the latter part of 1890, and yet some of them contained during that time an estimated population of eight to ten thousand people. Las Vegas has continued in its present condition for fifty years or more, and remains unorganized to-day. True, there is a town known as East Las Vegas, which, within the last few years, has been organized and has a legal existence.

We respectfully submit that as there is nothing in the history of the country which shows that there was an organized town by the name of Las Vegas, such as could receive title to real property, that the allegations in the bill should have been considered as admitted by the demurrer to be true.

The case of the National Bank *vs.* The County of Yankton, 101 U. S., 129, was cited in the Court of Appeals, and relied on by counsel for the appellees, and from it the argument was made that the existence of the town of Las Vegas was in terms recognized by the 6th section of the confirmatory act, and that it was within the power of Congress, and it did give to the town whatever capacity was necessary to make it the recipient of the intended confirmation. We deny the proposition that it did give to the town the capacity to make it the recipient of the intended confirmation. To have done so it would have had to have fixed the boundaries of the town, and this it did not do. We reply further that if there was no town by the name of Las Vegas, prior to the confirmatory act, then the grant could not have been *confirmed* to it (as Secretary Noble declared was a fact) for that would have been the making of a grant *de novo*.

If, as alleged in the bill, there was no town of Las Vegas with defined boundaries or legal capacity to take title to property or have any existence whatever, then it is submitted that it could not be made a party defendant. Under the allegations in the bill that there is no such place as Las Vegas the defense that the town of Las Vegas was a necessary party, and should have been made such, cannot be set up by a demurrer. That defense could only be made by plea or answer. The appellees might have demurred to all the remaining part of the bill, and filed a plea or answer to that part which alleged the non-

entity of the town of Las Vegas, and that, we submit, is the only way in which they could make that defense.

VI.

How Patents Should be Issued.

Patents should be issued in accordance with the established formula adopted by the General Land Office, and in accordance with the established precedents of the Land Department.

1. Established Formula. With reference to the issuance of patents for Spanish and French land grants arising under the treaty of 1803, the Commissioner of the General Land Office submitted to the Attorney-General of the United States a formula of a patent for his consideration. Said formula was submitted and passed upon by the Attorney-General, May, 1836, and is set out in his opinion, to wit:

> "Are the terms employed in the enclosed patent, to wit: 'Unto the said Rafael Lessieur, or to his legal representatives, and to his or their heirs and assigns forever' so vague and indefinite as to render the patent void for uncertainty? In other words, are the terms employed sufficiently precise to convey the title and indicate the legal grantee?"

The Attorney-General says:

> In considering public grants issued in great numbers by the officers of the Government, in accordance with a certain formula, deliberately adopted by the officers, the courts may with propriety resort to cotemporaneous documents on file in the proper department, for the purpose of ascertaining the intent of the grantors. If that be done in the present case, there will be no diffi-

> culty in ascertaining that the deed was intended to take effect in the manner above suggested.
>
> This form was first adopted to meet those cases in which the party originally entitled, had died; and when that event has not occurred, it would seem to be proper that the patent should be made out to the grantee named in the certificate without any alternative words." (Third Attorney-General's Opinion, p. 111.)

It appears that there arose a contention at or about that date, as to the effect of a patent issued to a person who had died before the issuance of the same, and this contention evidently inspired Congress to pass the Act of May 20, 1836, chap. 76, 5th Stat. at L., p. 31, entitled—"An Act to give effect to patents for public lands issued in the names of deceased persons," and which is carried in the Revised Statute as Section 2448, and is as follows: "Where patents for public lands have been, or may be, issued, in pursuance of any law of the United States, to a person who had died, or hereafter dies, and before the date of said patent, the title to the land designated therein shall inure to, and become vested in, the heirs, devisees, and assignees of said deceased patentee, as if the patent had issued to the deceased during his lifetime."

Justice Nelson, who rendered the opinion of this court, Feb. 13, 1865, in Hogan vs. Page, 2 Wall., 605, says:

> A difficulty had occurred in the office at an early date in respect to the formula of patent certificates and patents. : : : : : : : This difficulty also existed in respect to the Board of Commissioners under the acts of Congress for the settlement of French and Spanish claims. The result seems to have been, after consulting the Attorney-General, that the Commissioner of the Land Office recommended a formula that has since been very generally observed—namely: The issuing of the patent cer-

> tificate, and even the patent, to the original grantee or his legal representatives, and the same has been adopted by the several boards of commissioners. This formula, "or his legal representatives" embraces representatives of the original grantees in the land, by contract, such as assignees, or grantees, as well as by operation of law, and leaves the question open to inquiry in the Courts of Justice as to the party to whom the certificate, patent, or confirmation, should inure.

The formula adopted by the Secretary of the Interior as set out in the case of the "Town of Anton Chico," No. 29, confirmed by the Act of June 21, 1860, is as follows:

> "To —— ——— and —— ———, being the —— men to whom the grant was made by —— —— on —— day of ——— 18——, their representatives and assigns, as in said grant provided, which was confirmed as a private land claim, No. ——, by Act of Congress, entitled, "An Act to confirm certain Private Land Claims in the Territory of New Mexico," approved the 21st day of June, 1860. 1 L. D., 287.

In Bissell *vs.* Penrose, 8 How., 317, it was held that under the Act of Congress of 1836 an assignee of a claim could obtain confirmation of a title in his own name.

The petition of the assignee must, however, be presented to the tribunal authorized and designated by Congress to investigate said claims, and required to report upon the validity or invalidity, and who has the authority to recommend a confirmation or rejection of the same. The petitioner must show his derivative title from the original grantee. Not only that, but he must show that he owns the whole of the grant. If the grant is to be divided among a thousand persons, or any number, the confirmation and the patent should be in the name of the original grantee, (U. S. *vs.* Grimes, 2 Black., 610.)

Where the claimant presents the original title as well as his evidence of derivative title before the tribunal charged with the duty of investigating and reporting upon the validity or invalidity of said claim, it is held that the said tribunal decides upon both the original and the derivative title, and that the confirmation operates as a grant to the actual claimant or owner, although his name was omitted in the form of the confirmation. (Bissell *vs.* Penrose, 8th How., 317; Strother *vs.* Lucas, 6 Pet., 772; Carpenter *vs.* Rannells, 19 Wall., 138; Connoyer *vs.* Schaeffer, 22 Wall., 261.)

The petition to the Surveyor-General, September 11, 1855, for the confirmation of the grant to Maese and his associates, was made by Francisco Lopez, Henry Connelly, and Hilario Gonzales, for themselves and all other claimants and legal owners of said grant. Since no derivative titles were filed with the Surveyor-General by anyone to be passed upon by him, with the titles of the original grantees, then the confirmation was to none other than Maese and others, the original grantees. Neither did Congress have the name of any person or persons who had complete titles to the Las Vegas grant to be confirmed, except those of Maese and his associates.

2. *Established Precedent.* The action of the Commissioner of the General Land Office with reference to patents to the claims confirmed by the Act of June 21, 1860, has been uniform in terms and strictly conformed to the formula adopted by said office, and which had been used for a number of years.

In claim No. 1, confirmed in the first section of said act, Preston Beck was recognized as the confirmee to said claim by showing his derivative title to the Surveyor-General, from Juan Estaban Pino, the original grantee. Stoneroad *vs.* Stoneroad, 158 U. S., 240.

No. 4, Charles Beaubien, the assignee of Lee and Beaubien, original grantees, was recognized as the confirmee in said act of said claim. Tameling *vs.* U. S. Freehold Co., 93 U. S., 644.

No. 8 of said act, designated by the Surveyor-General in his report to Congress as the "Town of Los Trigos," the Secretary of the Interior ordered the Commissioner of the General Land Office to issue patent to the three original grantees, as shown by the report of the Surveyor-General to Congress, and that the patent should issue thereon in accordance with the provision of Section 2, Act March 3, 1869. (15 Stats., 342.) 14 L. D., 355.

No. 15, patent was issued by the Commissioner of the General Land Office, May 19, 1879, to Beaubien and Miranda, the original grantees, "their heirs and assigns." At the date of the issuance of said patent the title to the tract of land confirmed as claim No. 15, was in the Maxwell Land Grant Company. U. S *vs.* Maxwell Land Grant Co., 121 U. S., 625. Russel *vs.* Maxwell Land Grant Co., 158 U. S., 254. Interstate Land Co. *vs.* Maxwell Land Grant Co., 139 U. S. 569.

No. 25, confirmed by said act, designated by the Surveyor-General in his abstract as the "Town of Cañon de San Diego," patent was issued by the Commissioner of the General Land Office October 1st, 1881, to "Francisco Garcia and nineteen others named therein, the original grantees, and those claiming under or through them." 1 L. D., 287; Chavez *vs.* U. S., 168. U. S., p. 179. It will be observed that this patent was issued to the original grantees 84 years after the grant had been made by the Spanish Government.

No. 29, confirmed by said act and designated by the Surveyor-General in his abstract to Congress as claim of the "Town of Anton Chico," patent was issued by the

Commissioner of the General Land Office under the instruction of the Secretary of the Interior, February 9, 1883, "to Manuel Rivera and others, being the 36 men to whom the grant was made by Fecunda Melgares, May 2, 1822, their representatives and assigns." (1 L. D., 287–8.) It will be observed that this patent was made to the original grantees 61 years after the grant was made by the Spanish Government.

No. 32, confirmed by said act and designated by the Surveyor-General in his abstract and report, as the claim of the "Town of Mora" patent was issued by the Commissioner of the General Land Office, August 15, 1876, to the 76 persons to whom juridical possession was given in 1835, their heirs and assigns, as shown by the list accompanying the report of the Surveyor-General to Congress. It will be observed that the patent to this grant was issued 41 years after the grant was made.

No. 38, confirmed by said act and designated by the Surveyor-General in his report to Congress as the claim of "Ramon Vigil *et al.*," patent was issued by the Commissioner of the General Land Office, under instruction of the Secretary of the Interior, April 10, 1883, to "Pedro Sanchez, original grantee, his heirs, representatives and assigns," I. L. D. 288. This patent was issued for said claim 141 years after the grant was made by the Spanish government to Pedro Sanchez.

From the foregoing it will be seen that the Commissioner of the General Land Office, in issuing patents for the several land claims confirmed by the Act of June 21, 1860, adhered strictly to the formula adopted by said department years prior to the issuance of the same. In not a single case has he sought to issue patents to other than the original grantees, their heirs and assigns, except in the case at bar. Where parties had shown and filed

with the Surveyor-General, at the time of his investigation of the grant, a compiete and perfect derivative title from the original grantees, and such fact being reported by said Surveyor-General to Congress before the passage of the confirmatory act, then to the assignee.

VII.
To Whom Should Patent Issue.

How is the Commissioner of the General Land Office to ascertain the names of the persons to be inserted in the patent to the tract of land in issue? Simply by reading the act of confirmation and thereby ascertain that Congress June 21, 1860, confirmed private land claim "No. 20," as reported for confirmation by the Surveyor-General of New Mexico, communicated to Congress by the Secretary of the Interior in his letter dated February 3, 1860." Then by reading the report of the Surveyor-General and ascertain the *names* of the person or persons *whose title* is reported by said officer to Congress to be good and valid, and should be confirmed to the tract of land to which the grant had been made by the Mexican Government. And, furthermore, to ascertain from said report whether or not the Surveyor-General had reported to Congress that the original grantees had transferred their title to the whole of said grant to third parties, and if so, the name or names of those parties.

This Court, having under consideration private land claim "No. 15," confirmed by Section 1 of the Act of June 21, 1860. U. S. *vs.* Maxwell Land Grant Co., 121 U. S., 325, says:

> "In the present case the Surveyor-General had before him, not only the original grant of Armijo to Beaubien and Miranda, but he had the record of the juridical possession delivered to the grantees,

according to the laws of Mexico on that subject, made by the justice of the peace, Cornelio Vigil, accompanied by a map or Diseño, laying down with at least attempted particularity and precision the complete boundaries of this tract of land. So that the Surveyor-General, not only had the authority to determine the extent of the grant, as well as its validity, but he had the means of ascertaining it. * * *

The case before us is much stronger than the ordinary case of an attempt to set aside a patent, or even the judgment of a court, because it demands of us that we shall disregard or annul the deliberate action of the Congress of the United States. The Constitution declares (Article IV, Sec. 1), that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." At the time that Congress passed upon the grant to Beaubien and Miranda, whatever interest there was in the land claimed which was not legally or equitably their property was the property of the United States; and Congress having the power to dispose of that property, and having, as we understand it, confirmed this grant, and thereby made such disposition of it, it is not easily to be perceived how the courts of the United States can set aside this action of Congress. *Certainly, the power of the courts can go no further than to make a construction of what Congress intended to do by the act, which we have already considered, confirming this grant and others.*"

How did the Department or this Court ascertain who were the grantees and confirmees of private land claim No. 15? It was by reference to the reports of the Surveyor-General and the grant reported by him to Congress for confirmation, and showing the names of the persons to whom Congress confirmed said grant No. 15. Notwithstanding the fact that the title to the tract of land

confirmed as claim No. 15 was in the Maxwell Land Grant Co. May 19, 1879, the date of the issuance of the patent by the Land Department, the patent was issued to "Beaubien and Miranda, their heirs and assigns," which under the law inured to the benefit of the Maxwell Land Grant Company, the assignee.

This Court, in considering the said Act (June 21, 1860) with reference to private land claim "No. 4," confirmed by Section 1 of said Act, Tameling *vs.* U. S. Freehold Co., 93. U. S., 644, said:

> The Surveyor-General of New Mexico is clothed with large power, and required to decide upon the validity of each claim. Final action on the subject is reserved to Congress. Such action is, of course, conclusive, and, therefore, not subject to review in this or any other forum.
>
> It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the Surveyor-General, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action. We need only say that the facts are distinctly set forth that Luis Lee and Narciso Beaubien, September 27, 1843, petitioned the then Civil and Military Governor of New Mexico "For a grant of land in what is now the County of Taos, embracing the Costilla, Culebra and Trienchera Rivers, including the *Rito*, of the Indians, and Sangre de Cristo to its junction with the Del Norte River;" that the petition was referred by the Governor, to the prefect, with instructions to give the possession asked for by the petitioners; that they were put in possession with the boundaries contained in the petition, "vesting in them, their children and successors, a title in fee to said lands." After setting forth that, by the death of one of the parties, Charles Beaubien, as his heir at law inherited the undi-

vided half of the land, and that he acquired the remainder from the administrator of the other grantee, the conclusion is reached, that the grant is a good and valid one and that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition. The grant was approved and recommended for confiirmation by Congress.

Congress acted upon the claim as recommended for confirmation by the Surveyor-General. The confirmation being absolute and unconditional without any limitation as to quantity, we must regard it as effectual and operative for the entire tract.

The phraseology of the confirmatory act is, in our opinion, explicit and unequivocal."

The Commissioner of the General Land Office, in order to ascertain the names of the grantees and confirmees of private land claim No. 20, in his preparation of patent therefor, can easily ascertain that fact by following the concise statement of fact made by the learned Justice in the foregoing decisions.

If this Court cannot "sit in judgment upon either the recital of matters of fact by the Surveyor-General, or his decisions declaring the validity of the grant," where does the Secretary of the Interior or the Commissioner of the Land Office get such power? The Surveyor-General reports to Congress as a fact that the title to Maese and his associates to the tract of land in controversy is "a good and valid title," and that said tract of land "is lawfully separated from the public domain and entirely beyond the disposal of the General Government."

We submit that the recital of facts reported by the Surveyor-General to Congress for its action, which are proper to be referred to by the Commissioner of the General Land Office to ascertain the names of the grantees

and confirmees to private land claim No. 20, are as follows:

> That on the 20th day of March, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran and José Antonio Casaos, for themselves and in the name of 25 others, petitioned the corporation of El Bado for a tract of land for cultivation and pasture, situated in the County of El Bado and bounded as follows: On the north by the Sapello River, on the south by the boundary of the grant of Don Antonio Ortiz, and on the east by the Aguage de la Llegua, and on the west by the boundary of the town of El Bado.
>
> On the same day the corporation of El Bado transmitted the petition to the territorial deputation, with the recommendation that the petition be granted.
>
> On the 23rd of March of the same year the grant was made by the territorial deputation, with the boundaries asked for.
>
> On the 24th of the same month and year, Francisco Sarracino, the acting governor or political chief, directed the constitutional justice of El Bado to place the parties in possession, which was done on the 6th day of April, of the same year.
>
> The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but as far as the documentary evidence shows, is made in strict conformity with the laws and usages of the country at the time.
>
> It is firmly believed that the land embraced in either of the two grants (Baca and Maese *et al.*) is lawfully separated from the public domain and entirely beyond the disposal of the General Government, and that in the absence of the one the other would be a good and valid grant.

Although the Surveyor-General had reported that Baca heirs had contested the title of Maese and his associates

before him, yet the Commissioner of the General Land Office is fully apprised of the fact that Baca heirs have, since the making of said report, relinquished whatever title they had to the settlers on said tract of land under the grant made to Maese *et al.*, and in lieu of their interest his office had permitted the Baca heirs to locate 496,446.92 acres of out of the public domain, as provided by Section 6 of the Act of June 21, 1860. All of these facts being within the full knowledge of the Land Department, the Baca heirs would not be considered in the issuance of the patent. No other party would or could be considered as having a legal title and to whom patent should issue but Maese and his associates, their heirs, representatives and assigns.

VIII.

Result of Appellants and Appellees Contention.

It is alleged by appellants as a fact that Juan de Dios Maese and his associates, to whom the grant was made in 1835, are all dead; that they died seized and possessed of the lands known as the Las Vegas grant, except possibly some of the grantees had conveyed to others their interest in whole or in part to said grant.

It is further alleged as a fact that appellants are the heirs, representatives and assigns of said Maese and his associates, and that their titles to said grant are mediate or immediate, and that as such they hold their titles and peaceable possession of said tract of land. The demurrer of defendants admits this statement of facts. The records of the Land Department also show the latter state of facts.

The Secretary of the Interior, in his opinion of December 5, 1891, (13 L. D., 655,) recites that the Las Vegas grant, as originally surveyed, and the plat thereof ap-

proved by the Surveyor-General, December 8, 1860, contained an area of 496,446.96 acres, but that Mr. Julian, the then Surveyor-General of New Mexico, expressed the opinion that said grant should not legitimately embrace more than 20,000 acres, which estimate was subsequently reduced to 6,000 acres. The Secretary held that the extent of the Las Vegas grant should be made to include simply the allotments assigned to settlers under the original concession to Maese and his associates, and that—

> "A resurvey should be made so as to include only the lands which had been allotted or assigned to settlers under the terms of the original concession at the time the Territory of New Mexico became subject to the laws of the United States; and a patent for said lands should be issued on said survey to the town of Las Vegas, so that the proper parties in interest could perfect their titles to these lands. The public surveys should be extended over the residue of said lands, and the same thrown open under the general laws."

In accordance with said opinion, the Secretary of the Interior, February 12, 1894, instructed the Commissioner of the General Land Office to order the Surveyor-General of New Mexico to have said grant measured, and suggested the employment of one R. B. Rice to make the final survey. (Rept. Com. G. L. O., 1894, p. 273.) April 27, 1894, (Ib. 276) Mr. Rice was employed and instructed:

> "You will endeavor to determine the actual number of allotments made by the Constitutional Alcalda under the provisions of said grant at the time the Territory of New Mexico became subject to the laws of the United States; and you will also endeavor to determine the true limits or boundaries of said allotments, as the same appear

> and are set out in the hijuelas (title papers) issued to the settlers by the Alcalda making the distribution."

Deputy Surveyor Rice, April 30, 1895, in reply to a letter from the Commissioner, dated April 10, 1895, with reference to the propriety of said deputy demanding a chain of title from the present claimants back to the original grantees, says:

> "I am aware that it would be unreasonable to require everybody to get a chain of title from themselves back to the original allottees, and I have not been asking everybody to make the attempt. From what I can see and have learned about the matter, I am satisfied that the greatest objections are raised by those who can, but do not want to, show the original titles. I know that some of the old papers are honestly gone, and in such cases the present claimants cannot comply with a request to show the original." (Report Comr. of L. O., 1895, p, 253.)

In his reports, however, he designates a number of hijuelas (title papers) of assignments from the original grantees, on record in the County of San Miguel, which he had investigated. In not a single instance does he report a title from the town of Las Vegas, and neither was he instructed by the Land Department to require the production of a title from said town by any claimant of the land or any portion of the same.

It is proper here to state that on February 15, 1895, Jefferson Raynolds, for himself and the other inhabitants of the town of Las Vegas and the territory contained in the land grant, instituted a suit in the Supreme Court of the District of Columbia, seeking to enjoin the then Secretary of the Interior and Commissioner of the General

Land Office from prosecuting said resurvey under the decision of the Secretary of the Interior. (13 L. D., 646.) Injunction was granted by said court and affirmed by the Court of Appeals. (9 App. D. C., 261.) October 10, 1895, the Department ordered a discontinuance of said proposed resurvey. (Rept. Comr. L. O., 1896, p. 416.)

A patent as requested and sought by appellants, to wit: In the name of the original grantees, their heirs, representatives and assigns will inure and protect every interest equitable and consummate of all persons having an interest in and to said grant of land. The town of Las Vegas or any other town, corporation or individuals, having a title to any portion of said land, which will be recognized by any of the courts of the land, would be fully and amply secured and protected under said patent, and which will inure to the benefit of all such persons whose title would be respected by the Court. (Rev. Stats., 2448.)

We submit, that the grant having been made 66 years ago, that the natural presumption would be that during the 66 years a large number of transfers by devise as well as other characters of conveyance would have been executed by the original grantees, their heirs, and assigns, and that it would be against public policy, if for no other reason, to now disturb the titles of said land and parts thereof. That a patent now to issue in the name of the so-called town of Las Vegas would be to disturb and cast a cloud over the titles of every home or parcel of land upon said grant, and as such patent would take date of and relate back to September 11, 1855, the date when Connelly, Lopez and Gonzales filed their petition before the Surveyor-General of New Mexico, it would be to disturb all transfers and conveyances of every character whatever, made by and through the original grantees.

Mr. Justice Shiras, in the course of his opinion in the case of U. S. *vs.* Chaves, 159 U. S., 452, uses the following language:

> "Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is a general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for 30 years, and that said rule will be applied as a *presumptio juris et de jure* wherever by possibility a right may be aquired in any manner known to the law."

The records in this case show that the original grantees, their representatives and assigns, the appellants, have held exclusive and uninterrupted possession of the tract of land in controversy, from 1835, to the present, a period of 66 years, under the grant made by the Mexican Government, and with the boundaries as shown by the approved survey and plat made by the Surveyor-General, December 8, 1860.

H. C. BURNETT,
FRED BEALL,
Appellants' Solicitors.